No.

In the Supreme Court of the United States

Sanjuana Hinojosa, Samuel Hinojosa,
Selena Hinojosa, Corrine Hinojosa,
and Victor Perez,

Petitioners,

v.

State of Michigan, Department
Of Natural Resources.

On Petition For Writ of Certiorari To The Michigan Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state legislature has unlimited discretion in shaping the pattern of the state's immunity from liability contrary to the right guaranteed to private property owners by the Takings Clause of the Fifth Amendment that ensures just compensation when property is taken by the public.

2. Whether the Takings Clause of the Fifth Amendment applies when private property sustains actual physical damage caused by a fire hazard which the state failed to abate or allowed to continue.

INTRODUCTORY STATEMENT

On March 19, 2002 the occupied houses located at 2011 and 2101 Lansing Street, Detroit, Michigan were damaged by direct physical invasion from fire that originated from the structure located at 2015 Lansing. The State of Michigan owned 2015 Lansing between May 2, 2000 and March 19, 2002. 2015 Lansing sustained prior fire damage on January 3, 2001 that was never repaired or boarded-up, thereafter leaving the structure open to trespass, vacant, fire damaged and dangerous. The structure was a harbor for vagrants and trespassers who were ripping the wood siding off the structure and using it for fuel in a make-shift hole in the first floor.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners state that they have no parent companies or nonwholly owned subsidiaries.

NOW COME the Petitioners Sanjuana Hinojosa, Samuel Hinojosa, Selena Hinojosa, Corrine Hinojosa, and Victor Perez only, by and through their attorneys, BRIGGS COLEGROVE P.C., and pray that the Supreme Court grant a writ of certiorari to review the judgment of the court below. The Michigan Court of Appeals issued an opinion on September 9, 2004 and the Michigan Supreme Court denied Petitioners' application for leave to appeal on June 30, 2005.

CITATIONS TO OPINIONS BELOW

The order from the Michigan Supreme Court denying Petitioners' leave to appeal is reported at 472 Mich. ___; ___ N.W.2d ___ (2005) (App., *infra*, 19-29). The opinion of the Michigan Court of Appeals is reported at 263 Mich. App. 537; 688 N.W.2d 550 (2004). (App., *infra*, 3-18). The order of the trial court, which ruled against Petitioner is unreported. (App., *infra*, 1-2).

JURISDICTION

The trial court's order was entered on April 2, 2003. A timely right of appeal was filed and an opinion issued by the Michigan Court of Appeals on September 9, 2004. A timely application for leave to appeal was filed and an order denying leave to appeal was entered June 30, 2005. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Takings Clause of the Constitution provides in relevant part: "not shall private property be taken for public use, without just compensation." U.S. Const. art. V. The Takings Clause is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. U.S. Const. art. XIV.

The Takings Clause found in Michigan's Constitution states that: "[P]rivate property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." Mich. Const. art. X, §2.

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STATEMENT OF THE CASE

This case raises an important, recurring constitutional question relating to the Fifth Amendment Takings Clause as well as the nearly identical Takings Clauses found in the Michigan and nearly all other state constitutions. Can a state legislature circumvent or override the federal and state guarantee for just compensation when private property is taken by the public by merely classifying the wrongful action as a "tort" subject to governmental immunity?

It is not contested that each state by virtue of its statehood has the right to exercise the power of eminent domain to take and appropriate lands for roads, canals, state-houses, court-houses, school-houses and many other purposes needed to accomplish the object of governing. It is also not in dispute that each state, as a sovereign, is immune from suit unless it consents to liability and that any relinquishment of sovereign immunity must be strictly interpreted.

The Michigan legislature enacted its governmental tort liability act in 1964. The act was intended to provide uniform liability and immunity to both state and local governmental agencies. The act states that except as otherwise provided, a governmental agency is immune from tort liability if engaged in the exercise or discharge of a governmental function. Mich. Comp. Laws §691.1407(1) (1964). The act sets forth six statutory exceptions to governmental immunity: the highway

exception; the motor vehicle exception; the public building exception; the proprietary exception; the governmental hospital exception; and the sewage system exception.

What is in dispute is the uncontested fact that an actual physical taking occurred because of a tort (in this case a trespass nuisance) caused by a state agency in violation of the federal and state constitutional guarantees. If statutory governmental immunity trumps federal and state Takings Clauses, then the private property owner is left without remedy.

When presented with a federal and state constitutional takings claim, the state appellate courts specifically declined to rule that a tort, which is subject to statutory governmental immunity, "may constitute a constitutional taking." (App., *infra*, 14-15) and left Petitioners without federal or state constitutional protection. In Michigan at least, the state governmental immunity statute supersedes the federal and Michigan Constitutions.

Changing by judicial construction the settled meaning of words aptly used in the Constitution "is more than the exercise of legislative power. It wrests private rights from their moorings, lets down constitutional barriers, and alters the foundation of government." *Carmen v Secretary of State*, 384 Mich. 443, 452; 185 N.W.2d 1 (1971).

A. States Are Subject To The Takings Clause

The limitation on the exercise of the right of

eminent domain is so essentially a part of American constitutional law that it is believed that no state is now without it. Jurists, statesmen and commentators alike have said the when construing a provision of constitutional law, understood to have been adopted for protection and security to the rights of the individual as against the government, the constitutional protection is "beyond the power of ordinary legislation to change or control them." *Pumpelly v G. B. & M. Canal Co.*, 80 U.S. 166, 178 (1871).

The state appellate courts failed to acknowledge that the Michigan Supreme Court had already ruled that the doctrine of sovereign immunity is a creature of the legislature but is still subject to the "applicable and overriding provision of the State Constitution. To that extent, the legislature does not have an unlimited discretion in shaping the pattern of the state's immunity from liability." *Buckeye Union Fire Insurance Company v Michigan*, 383 Mich 630, 640; 178 N.W.2d 476 (1970). The police power of the Michigan legislature is not omnipotent, it cannot, under the guise of regulation, destroy property rights arbitrarily and without reason. *Peterman v Dept. of Natural Resources*, 446 Mich. 177, 190, n 17; 521 N.W.2d 499 (1994).

If the appellate courts construction of the Takings Clause is allowed to stand without oversight by this court, it would pervert the constitutional provision into a restriction upon the rights of the citizen instead of the government, "and make it an

authority for invasion of private right under pretext of the public good, which had no warrant in the laws or practice of our ancestors." *Pumpelly v G. B. & M. Canal Co.*, 80 U.S. 166, 178 (1871).

B. Federal Takings Law

The Takings Clause of the Fifth Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment and provides that private property shall not "be taken for public use, without compensation." See U.S. Const. art. V; U.S. Const. art. XIV; and *B. & Q. R. Co. v Chicago*, 166 U.S. 226 (1897). It does not prohibit the taking of private property, but instead places a condition on the exercise of that power and is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of interference amounting to a taking.

The "paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Linda Lingle, Governor of Hawaii v Chevron U.S.A. Inc.*, 544 U.S., No. 04-163, decided August 4, 2005. It was thought that the Takings Clause did not embrace regulatory takings, but in 1922 the court recognized that government regulation of private property could be so onerous that its effect is tantamount to a direct appropriation and compensable under the Fifth Amendment. *Id. supra* at ___

There are two categories of regulatory action that will generally be deemed *per se* takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of her property- however minor- it must provide compensation. This is nearly identical to the "paradigmatic taking" requiring direct physical invasion. The only distinction is how the physical invasion occurred- directly or through implementation of a regulatory scheme. The second type of regulatory taking applies to regulations that completely deprive an owner of all economically beneficial use of her property. *Id. supra* at ___

Outside of these two narrow categories, regulatory taking challenges are governed by factors such as the economic impact of the regulation on the owner and the character of the governmental action, "whether it amounts to a physical invasion or instead merely affects property interests" to promote the common. *Id. supra* at ___

The state appellate courts applied the test for a regulatory taking that merely deprived the Petitioners all economically beneficial use of their property rather than a direct physical invasion by fire. The appellate court stated that "plaintiffs' constitutional claim fails because plaintiffs did not allege any overt action by the state directed at plaintiffs' property" and further held that plaintiffs failed to allege that the state took affirmative action directed at plaintiffs property." (App., *infra*, 18).

It is not disputed that Petitioners' Takings Claim is for direct physical invasion of their

property. The longstanding distinction between the types of takings makes it "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a regulatory taking and vice verse." *Tahoe-Sierra Preservation Council, Inc. v Tahoe Regional Planning Agency*, 535 U.S. 302, 323 (2002).

From its very existence as a territory, Michigan has recognized that while exercising the power of eminent domain, the state may not deprive an individual of his property without due process of law and without compensation. *Peterman, supra* at 186. The term "taking" should not be used in an unreasonable or narrow sense and the courts have long held that the right of exclusion or the right of complete possession and enjoyment is one of the essential elements of property ownership. Any injury to the property of an individual which deprives the owner of the ordinary use of it is equivalent to a taking and entitles him to compensation.

Where real estate is actually invaded by superinduced water, earth, sand or other material it is a taking within the meaning of the Michigan Constitution. *Herro v Chippewa Co. Rd. Comm'rs*, 368 Mich. 263, 275; 118 N.W.2d 271 (1962). In a nearly identical case to the case at bar, a compensable taking was found where damage to property occurred where damage to private property was caused by a nearby nuisance maintained by the state. *Peterman, supra* at 189.

REASONS FOR GRANTING THE PETITION

This Court has the right and power to analyze state property law to determine whether there has been a taking of property in violation of the Fifth Amendment's Taking Clause. *Lucas v South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The decision below is final in the absence of this Court's review and fails to give proper guidance on either the federal or state level when there is a Taking Claim alleged. Unconstitutional takings occur in every state and territory and this decision has established erroneous precedent concerning an important question of federal law. The decision is inconsistent with others involving unconstitutional takings and erodes the protection afforded in the federal Constitution and in nearly every state Constitution.

"Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." *Pumpelly, supra* at178.

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

SANJUANA HINOJOSA, SAMUEL HINOJOSA, SELENA HINOJOSA, CORRINE HINOJOSA, VICTOR PEREZ and MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION, Subrogee of Rogelio Plascencia,

Plaintiff,

Case No. 01-165-MM

v

Hon. Thomas L. Brown

STATE OF MICHIGAN DEPARTMENT OF NATURAL RESOURCES,

Defendant.

_____/

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ORDER GRANTING SUMMARY DISPOSITION IN FAVOR OF DEFENDANT AND DENYING PALINTIFFS' MOTION FOR PARTIAL SUMMARY DISPOSITION

At a session of the Court held on
April 2, 2003

This action having come before the Court on the motion of plaintiff for summary disposition as to

response requesting summary disposition on its behalf, the Court having considered the brief and arguments of the parties.

IT IS HEREBY ORDERED that defendants motion for summary disposition is GRANTED.

IT IS FURTHER ORDERED that this action is DISMISSED with prejudice and without costs.

IT IF FURTHER ORDERED that plaintiffs' motion for summary disposition is DENIED.

s/Thomas L. Brown
Court of Claims Judge

STATE OF MICHIGAN
COURT OF APPEALS

SANJUANA HINOJOSA, SAMUEL HINOJOSA, SELENA HINOJOSA, CORRINE HINOJOSA, VICTOR PEREZ, and MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION,

Plaintiffs-Appellants,

FOR PUBLICATION
September 9, 2004
9:05 AM

v

DEPARTMENT OF NATURAL RESOURCES,

Defendant-Appellee.

No. 248185
Court of Claims
LC No. 02-000165-MM

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

We must decide in this case whether Const 1963, art 10, §2[1] requires the state to justly

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[1] "Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed

compensate neighboring property owners for damage caused by a fire that spread from an abandoned house after the state acquired it through tax delinquency proceedings. We hold that the circumstances do not constitute a "taking" or "inverse condemnation" because the state took no affirmative action toward plaintiff' property. At most, it failed to abate a fire-hazard nuisance. *Attorney General v Ankerson*, 148 Mich App 524, 561-562; 385 NW2d 658 (1986). Accordingly, we affirm the trial court's grant of summary disposition to defendant. MCR 2.116(C)(8).

I. Factual Background

The state acquired property at 2015 Lansing Street in Detroit on May 2, 2000, after no one redeemed it following a tax sale.[2] Fire damaged the house on the property on January 1, 2001. Subsequently, inspectors for the City of Detroit determined the house violated the city's building code; consequently, the city's Buildings and Engineering Department deemed the house a "dangerous building." On September 18, 2001, the city filed a lis pendens giving notice that the property would "be demolished as an unsafe

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by law. Compensation shall be determined in proceedings in a court of record." Const. 1963, art 10, § 2.

[2] The State treasurer's deed, acknowledged on January 5, 2001, quitclaimed the property to the "State of Michigan, whose address, Department of Natural Resources, Real Estate Division."

structure." After the January fire, vagrants frequented the house, warming themselves by burning wood siding in a hole in the floor of the structure.

Plaintiffs Sanjuana Hinojosa and her husband, Samuel Hinojosa, owned a neighboring home, which they rented to their two daughters, Selena and Corrine, and Victor Perez, all whom are plaintiffs in this case. Rogelio Plascencia owned another neighboring home insured by plaintiff Michigan Basic Property Insurance Association (MBPIA). According to affidavits signed by Mr. and Mrs. Hinojosa, they contacted city officials several times between January 31, 2001 and March 19, 2002 regarding the condition of 2015 Lansing Street. The Hinojosas also averred that a "Dangerous Building Notice" was posted at the property on January 31, 2001.

On March 19, 2002, the house at 2015 Lansing Street burned again. This fire also damaged the homes of the Hinojosas and Plascencia. The Hinojosas' home was not insured.

Plaintiffs filed a two-count complaint, alleging trespass-nuisance and an unconstitutional taking or inverse condemnation. Plaintiffs' subsequently moved for summary disposition pursuant to MCR 2.116(C)(9) and (10). Defendant also moved for summary disposition on the basis of MCR 2.116(C)(7), (8), and (I)(2). The trial judge, sitting as the court of claims, heard arguments of counsel on April 2, 2003. The parties agreed that because plaintiffs' complaint was filed on July 29, 2002,

plaintiffs' trespass-nuisance tort claim was barred on the basis of governmental immunity. MCL 691.1407; *Pohutski v Allen Park*, 465 Mich 675, 690, 699; 641 NW2d 219 (2002). Regarding plaintiffs' constitutional claim, the trial court agreed with the state that plaintiffs' reliance on *Buckeye Union Fire Ins Co v Michigan*, 383 Mich 630; 178 NW2d 476 (1970) for the proposition that trespass-nuisance is a constitutional tort was misplaced. Further, because plaintiffs' complaint did not allege "any overt activity which interfered with the Plaintiffs enjoyment of their property," the court determined that plaintiffs had not alleged a "taking" of property that required just compensation. The parties also stipulated that no facts existed that would support amending plaintiffs' complaint to allege an overt act by the state. MCR 2.116(I)(5). Accordingly, the trial court entered its order granting defendant's motion to dismiss. Plaintiffs appeal by right.

II. Standards of Review

We review do novo the trial court's decision on a motion for summary disposition. *Spiek v Dep't of Tranpsortation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Id.* The trial and reviewing courts must accept all well-pleaeded factual allegations as true, construing them in a light most favorable to the nonmoving party. *Maiden v*

Rozwood, 461 Mich 109, 119; 597 NW2d 817 (1999). The motion may be granted only "where the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

We review d novo the trial court's decision on a motion for summary disposition under MCR 2.116(C)(7) to determine if the moving party was entitled to judgment as a matter of law. *Lavey v Mills*, 248 Mich App 244, 249; 639 NW2d 261 (2001). A court must consider all submitted documentary evidence in a light most favorable to the nonmoving party. *Id* at 250. Further, a court must accept as true the contents of the complaint unless specifically contradicted by submitted documentary evidence. *Id.*; *Maiden, supra* at 119.

We review constitutional questions de novo. *County Rd Ass'n v Governor*, 260 Mich App 299, 303; 677 NW2d 340 (2004); *Wayne Co Chief Executive v Governor*, 230 Mich App 258, 263; 583 NW2d 512 (1998).

III. Analysis

A. *Buckeye Union Fire Ins Co v Michigan*

We agree with the trial court and defendant that Buckeye, which considered a factual situation similar to that of the case at bar, does not control the constitutional question presented here. In *Buckeye*, the plaintiffs contended unoccupied

industrial property the state acquired through tax delinquency proceedings was readily accessible to vandals and trespassers, creating a fire hazard that resulted in fire damage to neighboring property. *Buckeye, supra* at 632. Our Supreme Court determined that the state was not protected by sovereign immunity against the plaintiffs nuisance claim. *Id.* at 644.

In the first section its opinion in *Buckeye*, the Court emphasized that the state's liability was predicated on maintaining a nuisance, observing:

> It was in the very nature of the nuisance involved in this case – a fire hazard – the eventually negligent or lawless acts or sheer chance or an act of God (lightning) would convert the peril to the neighboring land into a destructive force – the hazard – the nuisance took its toll. Damage to plaintiffs flowed from the nuisance and the mere fact that negligence may have existed in a variety of acts or by inaction by the state during the continuing period of the nuisance will not permit it to escape its liability [*Id.* at 638.]

In the second section of its decision, the *Buckeye* Court held that the fact that the property could still be redeemed on the date of the fire, did not affect the state's liability. *Id.* at 638-640.

In the final section of its opinion, the *Buckeye* Court addressed the issue of sovereign immunity.

Id. at 640-644. the Court reasoned that immunity would be improperly applied in light of the 1908 constitutional prohibition against taking property for public use without just compensation at the time of the fire.[3] *Id.*, 641-643. The Court quoted *Thornburg v Port of Portland*, 233 Or 178; 376 P2d 100 (1962) for the proposition that "'a taking occurs whenever government acts in such a way as substantially to deprive an owner of the useful possession of that which he owns, either by repeated trespass or by repeated non-trespassory invasions called nuisance.'" *Buckeye, supra* at 643, quoting *Thornburg*, supra at 192 (internal punctuation omitted). The *Buckeye* Court concluded that the "fire hazard which the state permitted to continue was a nuisance which directly interfered with the property of plaintiffs' subrogors and ultimately led to its damage." *Id.* at 643. Thus, the *Buckeye* Court held: "There is no sovereign immunity applicable to a situation of nuisance as we have in this case." *Id.* at 644.

But we must review the *Buckeye* decision in its historical perspective. Before August 1, 1970, appellate decisions governed sovereign immunity. *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 607; 363 NW2d 641 (1984), citing *Pittman v City of Taylor*, 398 Mich 41, 46; 247 NW2d 512 (1976) (Kavanagh, CJ). Further, because the fire at

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[3] "Private property shall not be taken by the public nor by any corporation for public use, without the necessity therefore being first determined and just compensation therefore being first made or secured in such a manner as shall be prescribed by law." Const. 1908, art 13, § 1.

issue in *Buckeye* occurred before the adoption of Michigan's current constitution, the Court applied Michigan's 1908 constitution to hold that common-law sovereign immunity did not shield the state from tort liability for nuisance. Thus, neither statutory immunity, MCL 691.1407, nor Const 1963, art 10, §2, were at issue in *Buckeye*. The liability imposed on the state was for the tort of nuisance, not to justly compensate an owner for the taking of private property for public use. Nevertheless, the *Buckeye* Court relied on the Takings Clause as its rationale for concluding common-law sovereign immunity did not shield the state from liability for nuisance.

Our Supreme Court later would address "whether, in light of the governmental tort liability act[4] and *Ross*, [*supra*,] any common-law tort-based exception to governmental immunity may be recognized." *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 145; 422 NW2d 205 (1988), overruled by *Pohutski*, *supra* (emphais in original). Our Supreme Court in *Ross*, *supra* at 618, held that statutory governmental immunity is to broadly construed, its exceptions narrowly. See *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998) (citations and footnote omitted), where the Court noted, "It is now well established, as the result of the Court's seminal governmental

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[4] MCL 691.1401, *et seq.*, 1964 PA 170, as amended by 1970 PA 155, effective August 1, 1970. The 1970 amendment cured a constitutional title-object defect, Const. 1963, art 4, § 24, as determined by *Maki v. East Tawas*, 385 Mich. 151, 188 N.W.2d 593 (1971). See *Hadfield*, *supra* at 147 n. 2, and *Ross*, *supra* at 606-607.

immunity opinion in *Ross*, [*supra*], and its progeny, that the term "governmental function" is to be broadly construed and the statutory exceptions thereto ...are to be narrowly construed."

The heart of the act conferring governmental immunity for tort liability is found in § 7 of the statute, which provided when considered by the *Hadfield* Court:

> Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed. [*Hadfield*, *supra* at 146, quoting MCL 691.1407][5]

In parsing § 7, the Court recognized that "[t]here is no doubt that nuisance is a tort and that liability for nuisance would be within the scope of statutory governmental immunity as expressed in

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[5] This provision is now subsection 1 of section 7 of the act: "Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed." MCL 691.1407(1).

the first sentence of § 7" *Hadfield, supra* at 147. But the Court found that the second sentence of § 7 not only incorporated common-law immunity but also judicially created exceptions, including nuisance. *Id.* at 147-148. Accordingly, the *Hadfield* Court held "a limited trespass-nuisance exception to governmental immunity" continued to exist consistent with the case law predating statutory immunity, defining "trespass-nuisance" as "a direct trespass upon, or the interference with the use or enjoyment of, land that results from a physical intrusion caused by, or under the control of, a governmental entity." *Id.* at 145. The Court described the elements of this exception to governmental immunity as: "condition (nuisance or trespass); cause (physical intrusion); and causation or control (by government)."

The *Hadfield* Court justified its holding with the close association in case law between trespass-nuisance as an exception to sovereign immunity on the one hand and the constitutional prohibition against taking private property for public us on the other hand. Id. at 156-169.[6] Indeed, the *Hadfield* Court opined that "the "Taking" Clause of the constitution formed the basis of the trespass-nuisance exception as it evolved prior to 1964." *Id.* at 165 (footnote omitted). Regarding *Buckeye*, the *Hadfield* Court observed that, "although the plaintiff had alleged nuisance and this Court found nuisance, the holding was premised on the fact that

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[6] The Court surveyed cases from *Pennoyer v. Saginaw*, 8 Mich. 534 (1860) and through the Court's 1970 decision in *Buckeye, supra*.

an unconstitutional taking had occurred," and that the *Buckeye* Court treated the two causes of action as synonymous. *Id.* at 168. But the Court also noted that "[d]irect reliance on [the Takings Clause] should not be confused with the assertion of the trespass-nuisance exception ... [because] other trespass-nuisance cases that cited the provision of the constitution merely employed that provision as a rationale for the judicially created rule that would impose liability in a tort setting involving governmental immunity." *Id.* at 165 n 10. Our Supreme Court later would again emphasize that a constitutional taking and the tort of trespass-nuisance are distinct actions. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 206-207; 521 NW2d 499 (1994). In sum, although judicial decisions have closely associated trespass-nuisance with the Takings Clause, it remains a tort.

The two causes of action are differentiated by their sources and by the damages recoverable. The Legislature has the constitutional authority[7] to modify or abolish the common-law tort of trespass-nuisance. See *Philips v Mirac*, Inc, 470 Mich 415, 430; ___ NW2d ___ (2004), citing *Donajkowski v Alpena Power Co*, 460 Mich 243, 256 n 14; 596 NW2d 574 (1999). But an action that establishes an unconstitutional taking may not be limited except

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[7] Const. 1963, art 3, § 7 provides, "The common law and the statue laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed."

as provided by the constitution because of the preeminence of the constitution. See. e.g., *Smith v Dep't of Public Health*, 428 Mich 540, 544, 641; 410 NW2d 749 (1987); *Burdette v State*, 166 Mich App 406, 408; 421 NW2d 185 (1988) ("Governmental immunity is not available in a state court action where it is alleged that the state has violated a right conferred by the Michigan Constitution."). Thus, the available damages in a "takings" cause of action are limited to "just compensation." See *Silver Creek Drain Dist v Extrusions Divisions, Inc*, 468 Mich 367, 374-379; 663 NW2d 436 (2003) (discussing the historical development of the term of "just compensation' and construing it as "the proper amount of compensation for property [that] takes into account all factors relevant to market value").

In the case at bar, the trial court correctly dismissed plaintiffs' tort claim of trespass-nuisance because our Supreme Court in *Pohtuski* overruled *Hadfield*, finding that "the plain language of the governmental tort liability act does not contain a trespass-nuisance exception to governmental immunity." *Pohutski, supra* at 690. But the majority in *Pohutski* pointedly declined to address whether facts which previously might have supported liability for a trespass-nuisance could establish an unconstitutional taking. The *Pohutski* Court stated:

> The parties have addressed whether trespass nuisance is not a tort within the meaning of of the governmental immunity statute, but

> rather an unconstitutional taking of property that violates Const 1963, art 10, § 2. the trial courts in these cases have yet to address the takings claims. Therefore, we decline to discuss those claims at this time. [*Id.* at 699.]

Thus, although presented the opportunity, our Supreme Court declined to adopt Justice Kelly's view that *Buckeye* "acknowledged that the trespass-nuisance exception has a constitutional basis," and that "[g]overnmental immunity is not a defense to a constitutional tort claim, hence not a claim based on trespass-nuisance." *Pohutski, supra* at 709 (Kelly, J. dissenting), citing *Thom v State Hwy Comm'r*, 376 Mich 608, 628; 138 NW2d 322 (1965). We conclude, therefore, that the issue of whether trespass-nuisance as alleged here may constitute a constitutional taking was not decided in Buckeye. Hence, we must consider other decisions addressing the application of the Takings Clause.

B. The Takings Clause

We conclude that the trial court correctly found that plaintiffs' failed to state a cause of action for an unconstitutional "taking" or "inverse condemnation" because the complaint alleged no affirmative action by the state directed at plaintiffs' property but at most alleged negligent failure to abate a nuisance. The latter claim is a tort for which the statute provides no exception and is barred by governmental immunity.

What governmental action constitutes a "taking" is not narrowly construed, nor does it require an actual physical invasion of the property. *Detroit Bd of Ed v Clarke*, 89 Mich App 504, 508; 280 NW2d 574 (1979), citing *Thom, supra* at 613-614. No precise formula exists. *Clarke, supra.* Pertinent factors include whether "the governmental entity abused its exercise of legitimate eminent domain power to plaintiff's detriment." *Heinrich v Detroit*, 90 Mich App 692, 698; 282 NW2d 448 (1979). Further, a plaintiff alleging inverse condemnation must prove a causal connection between the government's action and the alleged damages. *Id.* at 699. A plaintiff alleging a de facto taking or inverse condemnation must prove "that the government's actions were a *substantial* cause of the decline of his property's value" and also "establish the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property." *Id.* at 700 (emphasis in original). See, also, *Charles Murphy, MD, PC v Detroit*, 201 Mich App 54, 56; 506 NW2d 5 (1993) ("While there is no exact formula to establish a de facto taking, there must be some action by the government specifically directed toward the plaintiff's property that has the effect of limiting the use of the property.").

In *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 130; 680 NW2d 485 (2004), this Court again affirmed the two elements necessary for proving an inverse condemnation case. The *Merkur* Court, which affirmed a $7 million jury award,

opined that a plaintiff in such a case "has the burden of proving ... that the government's actions were a substantial cause of the decline of its property" and "must also establish that the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property." *Id.*

We find this Court's decision in *Ankersen*, supra, instructive in applying these principles to the case at abr. In *Ankersen*, the Attorney General sought to abate a nuisance: the improper storage of hazardous chemicals that created a fire hazard. The "innocent" landowners brought a counterclaim against the Director of the Department of Natural Resources and the Natural Resources Commission alleging that the "counterdefendants participated in the creation of a nuisance and that their actions amounted to an uncompensated taking." *Ankersen, supra* at 532, 558. The Court stated the two elements of an inverse condemnation claim are (1) "that the government's actions were a *substantial* cause of the decline in property value," and (2) "that the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property." *Ankersen, supra* at 561, quoting *Heinrich, supra* at 700. First, the *Ankersen* Court concluded that the state's actions of licensing a person or corporation to conduct a private business "cannot be regarded as a taking of private property by the government for public use." *Ankersen, supra* at 561. The Court then continued,

> Secondly, the state's alleged misfeasance in licensing and supervising the operation does not constitute "affirmative actions directly aimed at the property". Thus, ... the inaction and omissions by the state cannot be found to constitute a "taking". [*Id.* at 562.]

C. Conclusion

When we apply the settled principles of required proof to establish a de facto taking or inverse condemnation to the present case, we conclude that the trial court correctly ruled that plaintiffs' constitutional claim fails because plaintiffs did not allege any overt action by the state directed at plaintiffs' property. In fact, plaintiffs admitted that no facts exist which would support amending the complaint to allege the necessary overt act. We therefore hold that plaintiffs' failed to allege a "taking" or "inverse condemnation" for which just compensation is required by Const 1963, art 10, § 2. Because plaintiffs failed to allege that the state took affirmative action directed at plaintiffs' property, which was a substantial cause of the decline of their property's value, plaintiffs "failed to state a claim on which relief can be granted." MCR 2.116(C)(8). Accordingly, we affirm.

s/Christopher M. Murray
s/Jane E. Markey
s/Peter D. O'Connel

Order

June 30, 2005

127177

Michigan Supreme Court
Lansing, Miichigan

Clifford W. Taylor
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Justices

SANJUANE HINOJOSA, SAMUEL HINOJOSA, SELENA HINOJOSA CORRINE HINOJOSA, VICTOR PEREZ, and MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION,
Plaintiffs-Appellants

SC: 127177
COA: 248185
Ingham Ct Cl:
02-000165-MM

v

DEPARTMENT OF NATURAL RESOURCES,
Defendant-Appellee.
_____/

On order of the Court, the application for leave to appeal the September 9, 2004 judgment of the Court of Appeals is considered, and it is

DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

KELLY, J., would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complee copy of the order entered at the direction of the Court.

June 30, 2005 s/Corbin R. Davis, clerk

No.

In the Supreme Court of the United States

Sanjuana Hinojosa, Samuel Hinojosa,
Selena Hinojosa, Corrine Hinojosa,
and Victor Perez,

Petitioners,

v.

State of Michigan, Department
Of Natural Resources.

On Petition For Writ of Certiorari To The Michigan Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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(517) 373-6434

Proof of Service

STATE OF MICHIGAN)
) SS
COUNTY OF WAYNE)

SARAH W. COLEGROVE, being first duly sworn, deposes and says that on September 28, 2005 she served a copy of Petitioners PETITION FOR WRIT OF CERTIORARI and this PROOF OF SERVICE upon: MARK V. SCHOEN. ESQ. (Attorney for Respondent State of Michigan, Department of Natural Resources), P.O. Box 30736, Lansing, Michigan 48909; Clerk, Michigan Supreme Court, Michigan Hall of Justice, 925 West Ottawa, P.O. Box 30052, Lansing, Michigan 48909; Clerk, Michigan Court of Appeals, 3020 West Grand Blvd., Suite 14-300, Detroit, Michigan 48202; and Clerk, Michigan Court of Claims, 313 West Kalamazoo, P.O. Box 40771, Lansing, Michigan 48909-7971, by mailing same to said attorney and clerks in a sealed envelope, properly addressed, with first class postage prepaid thereon, and by depositing same in the United State Mail at Detroit, Michigan.

Sarah W. Colegrove

Subscribed and sworn before me
this 28th day of September, 2005

Todd E. Briggs, Notary Public, Wayne County.
My Commission expires February 6, 2006